IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	
	)	No. 62019-3-I
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
	)	
GARY LEE SCHOOLCRAFT,	)	
	)	
Appellant.	)	FILED: August 17, 2009
_____	)	

Schindler, C.J.—Gary L. Schoolcraft appeals his conviction of attempting to elude a pursuing police vehicle. Schoolcraft claims the trial court violated his constitutional rights by (1) denying his timely request to act as co-counsel and (2) denying his motion to appoint new counsel based on an actual conflict of interest. Alternatively, Schoolcraft argues the record establishes there was an irreconcilable conflict with his attorney and the trial court's inquiry was inadequate. Schoolcraft also asserts the trial court abused its discretion in denying his motion to dismiss for governmental misconduct. Because the record does not support Schoolcraft's arguments, we affirm the conviction.

FACTS

At approximately 10:00 p.m. on January 23, 2008, Everett Police Officer Troy

Meade was on routine patrol in a marked patrol car. When Officer Meade saw a car stop and park in an area posted with "no trespassing" signs, he drove up behind the car. Officer Meade turned on the patrol car's spotlight and activated the flashing emergency lights. The driver of the car, Gary L. Schoolcraft, made a U-turn and drove off. Officer Meade turned on the siren in the patrol car and followed Schoolcraft. When Schoolcraft continued to accelerate, Officer Meade called for backup. The pursuit ended after Schoolcraft ran a stop sign in a residential neighborhood and collided with a backhoe. Schoolcraft attempted to run away, but the officers were able to apprehend him.

After waiving his Miranda[1] rights, Schoolcraft told Officer Meade and Officer Michael McAvoy that he drove away because he was driving with a suspended license. Officer Meade confirmed Schoolcraft's license was suspended.

The State charged Schoolcraft with attempting to elude a pursuing police vehicle. The court appointed Ann Harper as Schoolcraft's attorney. At the trial call hearing on May 9, the court granted the defense request for a continuance to conduct additional investigation. Soon thereafter, Harper left the public defender's office and the court appointed Paul Thompson to represent Schoolcraft. At the request of the defense, the court continued trial a second time to June 26. The State objected to any further trial continuances. Prior to the June 26 trial date, the court held a CrR 3.5 hearing and ruled that Schoolcraft's statements to the police were admissible at trial.

[1] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

On June 26, Schoolcraft filed a pro se "Motion to Represent Self Pro Se Co-Councle [sic] only." Schoolcraft explained that he wanted to act as co-counsel so he could present two motions that his attorney was unwilling to file, a motion to suppress and a motion to dismiss.

> THE COURT: Now, do you want to represent yourself on the entire case by yourself.
> THE DEFENDANT: Not particularly, but I want --
> THE COURT: What do you want to do then?
> THE DEFENDANT: I want -- I got two motions that are almost ready to be filed as a regular motion, but my attorney is unwilling to help me file those motions.
> THE COURT: What are the motions that you want to file?
> THE DEFENDANT: Okay. One of them is suppressing of evidence of testimony, and the other one is a dismissal.
> THE COURT: And why do you want the case dismissed?
> THE DEFENDANT: Well --
> THE COURT: On what basis? Speedy trial?
> THE DEFENDANT: No. It's very confidential information.

Schoolcraft's attorney confirmed Schoolcraft wanted him to file the motions to dismiss but told the court that he did not believe he could ethically do so. The court denied Schoolcraft's motion to act as co-counsel, ruling, "[t]here is no legal basis on which a defendant has a right to act as co-counsel in his own case." The court also ruled that the case would proceed to trial as scheduled.

The next day, on Friday June 27, Schoolcraft made a motion to appoint new counsel or in the alternative to represent himself pro se. Schoolcraft stated that he wanted more time to meet with his attorney and was concerned that his attorney was not ready for trial.

> THE COURT: Tell me the reasons that you want to have

> Mr. Thompson removed from the case.
>
> THE DEFENDANT: I only met him three times now and they're very, very short times. I have several questions that I need to ask -- I'd like to ask him that I wanted to ask him. I even sent him a letter. It's my case and, you know, I want to make sure I get a fair, honest trial, and I've been looking over my case. I have it all fully documented.
>
> I've also had 25 cases of the same type of case I am, I've looked over very carefully. I've gone through, over everything. I have a lot of the laws from the law library that the -- court rules, I've reviewed everything. I've documented every conversation that's ever been talked about between me and Ann Harper and Paul, and I've come to this conclusion that he is not effectively handling it.
>
> I think one problem is, he's trying to rush it into this trial before we have a chance to sit down and even talk about how the jury instructions are going to go, how the testimony is going to go. All I'm asking is at least have a mutual understanding so we can, you know, be on the same page. I don't want to go in there empty-handed, Your Honor. I've been through the system all my life off and on. You know, I kind of got an idea how things are run. And I know that it ain't right. And, you know, I'm sorry for the court taking their time and, you know, I've been sitting in jail for six months now because I want to make sure this case is right. And it has taken a while for certain steps of my case to be investigated.

The court then asked the attorney whether he had reviewed the discovery and was ready for trial. In response, the attorney confirmed that he was prepared to proceed with trial. When the court asked the attorney about jury instructions, Schoolcraft interjected and stated that the attorney did not review all of the instructions with him.

> THE DEFENDANT: There's like 13, 14 different types of jury instructions. I've had the one that says for eluding right on it. It's a whole list and he says those aren't the ones you that you use. He sent me two pages, the same ones -- I have like 13 of them, and he sent me two pages of the 13 I have, the same ones. I tried showing him all my paperwork, Your Honor. I tried explaining to him what I do have so we can work together, I would save him a lot

> of time researching and going over stuff. You know, it's just a matter of working together on this. That's all I'm asking is to work together.

When the court asked Schoolcraft if there were any other concerns, Schoolcraft reiterated that he wanted his attorney to spend more time going over the case with him. The court denied the motion to substitute counsel, ruling that "it boils down to essentially that he does not feel that Ms. Harper and/or Mr. Thompson have spent enough time with him going over things with him." The court also addressed the attorney's unwillingness to file the two motions to dismiss, stating that it is "not only trial strategy, but in terms of the attorney abiding by the cannons [sic] of ethics in terms of bringing motions that they believe are in good faith." The court ruled that defense counsel's unwillingness to file the motion was not a basis to substitute counsel. The court also ruled that the trial judge would consider Schoolcraft's motion to represent himself pro se.

After an extensive colloquy, the trial court granted Schoolcraft's motion to proceed pro se. Schoolcraft then made a motion to dismiss on the grounds that the initial traffic stop was unlawful and a motion to dismiss for alleged governmental misconduct. The trial court denied the motions to dismiss.

The next morning, Schoolcraft made a motion to reappoint Thompson as his attorney. Although Schoolcraft referred to previous disagreements with Thompson, he told the trial court, "I am not mentally prepared to proceed in this file without proper representation. And I feel assured that my attorney is going to do the job the best of

his ability."

> THE DEFENDANT: Your honor, I am emotionally drained because I been through a lot. I have not – I am not mentally prepared to proceed in this file without proper representation. And I feel assured that my attorney is going to do the job the best of his ability. And now I am forced to have the same attorney that I know for a fact beyond doubt was not working with me up to this point.
> . . .
> I have told Paul, 'I hate you. I'm turning you into the bar association.' He made me have a nervous breakdown. At the last visit he put me in suicidal watch. I am sure that he's mad at me at this point and may be an issue. You know, I'm not going to say for sure, but could be an issue.

After the attorney confirmed that he was willing to represent Schoolcraft and prepared to proceed, the court reappointed him to represent Schoolcraft. "So I think despite the differences that may have existed between the defendant and defense counsel, he is still better off with an attorney."

At trial, the State called the officers and Michelle Taylor to testify. Taylor testified that Schoolcraft nearly collided with her car. Schoolcraft testified on behalf of the defense. Schoolcraft said that he drove away because he did not realize the car was a police car. However, Schoolcraft admitted that at some point during the pursuit he knew that a police car was following him.

At the request of Schoolcraft's attorney, the court instructed the jury on the lesser included offense of failure to obey a police officer. During closing, the defense attorney argued that Schoolcraft was confused and had hearing difficulties that were readily apparent to the jury from his testimony at trial. The attorney argued that at

most, the jury should convict on the lesser included offense of failure to obey a police officer.

The jury convicted Schoolcraft of attempting to elude a pursuing police vehicle. With an offender score of 10, the court imposed a standard range sentence of 29 months.

ANALYSIS

Motion to Act as Co-Counsel

Schoolcraft asserts that the court abused its discretion in denying his motion to act as co-counsel. Schoolcraft argues that the court erred in denying the request on the erroneous grounds that "[t]here is no legal basis on which a defendant has a right to act as co-counsel in his own case."

There is no constitutional right to act as co-counsel. State v. Harris, 48 Wn. App. 279, 283, 738 P.2d 1059 (1987). Requests for hybrid representation are disfavored, and should only be granted on a "substantial showing" that "the cause of justice will thereby be served." State v. Hightower, 36 Wn. App. 536, 541, 676 P.2d 1016 (1984) (quoting People v. Mattson, 51 Cal. 2d 777, 336 P.2d 937, 952 (1959)). But "[w]hether to allow hybrid representation remains within the sound discretion of the trial judge." United States v. Halbert, 640 F.2d 1000, 1009 (9th Cir. 1981).

While the court erroneously stated that it did not have the authority to allow Schoolcraft to act as co-counsel, the record supports the conclusion that the court would have denied the motion. State v. McGill, 112 Wn. App. 95, 100-101, 47 P.3d

173 (2002). The only reason Schoolcraft wanted to act as co-counsel was to bring two motions his attorney was unwilling to file for ethical reasons. The record also shows the court was concerned about any further delay of the trial.

Substitution of Counsel

Schoolcraft argues he was denied the right to effective assistance of counsel because of an actual or an irreconcilable conflict with his attorney. Schoolcraft also argues that the trial judge erred by failing to adequately inquire into the nature of the conflict when Schoolcraft asked the court to reappoint his attorney.

A criminal defendant has a constitutional right to effective assistance of counsel, but does not have an absolute right to any particular advocate. State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). An indigent defendant dissatisfied with appointed counsel must show good cause to warrant substitution of counsel, such as a conflict of interest or an irreconcilable conflict. State v. Stenson, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997) (Stenson I). In deciding a motion to substitute counsel, the court must consider: (1) the reasons given for the dissatisfaction, (2) the court's own evaluation of counsel's representation, and (3) the effect of any substitution on the scheduled proceedings. Stenson I, 132 Wn.2d at 734.

A defendant's general lack of confidence or trust does not justify appointment of new counsel. Varga, 151 Wn.2d at 200. However, "[i]f the relationship between the lawyer and client completely collapses," refusal to substitute counsel violates the defendant's constitutional right to effective assistant of counsel. In re Personal

Restraint of Stenson, 142 Wn.2d 710, 722, 16 P.3d 1 (2001) (Stenson II) (citing United States v. Moore, 159 F.3d 1154, 1158 (9th Cir. 1998)).

In determining whether the trial court abused its discretion in concluding there was not an irreconcilable conflict, we consider: (1) the extent of the conflict, (2) the adequacy of the court's inquiry, and (3) the timeliness of the motion. Stenson II, 142 Wn.2d at 723-24.

An actual conflict is different from that of an irreconcilable conflict. Stenson II, 142 Wn.2d at 721-22. To show a violation of the right to effective assistance of counsel based on a conflict of interest, the defendant must show an "actual" conflict of interest. State v. Dhaliwal, 150 Wn.2d 559, 570, 79 P.3d 432 (2003). An actual conflict of interest is a conflict that adversely affected the attorney's performance rather than merely being a theoretical division of loyalties. Dhaliwal, 150 Wn.2d at 570. An actual conflict of interest exists when an attorney's interests are "hostile" to the client's interests. Mannhalt v. Reed, 847 F.2d 576, 579-80 (9th Cir. 1988).

Actual Conflict of Interest

Schoolcraft argues that because there was a conflict of interest with his attorney, the court erred in failing to appoint new counsel. Schoolcraft contends that by informing the court that he could not file the motions to dismiss based on ethical considerations, the attorney acted against Schoolcraft's interest in favor of protecting his professional reputation.

> MR. THOMPSON: Your Honor, I'm not sure that I can add much more without breaching any confidentiality that I still currently

> have with Mr. Schoolcraft. It is just my understanding that he does wish to represent himself, as well as file motions, which I do not believe ethically that I can file.

The record does not support Schoolcraft's claim of an actual conflict of interest that adversely affected the attorney's performance. The attorney's undisputed reason for not filing the two motions to dismiss was based solely on legitimate ethical considerations. Under RPC 3.1, an attorney has an ethical obligation to not bring any motion that lacks a basis in law or fact. The cases Schoolcraft cites are distinguishable. Mickens v. Taylor, 535 U.S. 162, 183, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002) (actual conflict between attorney's obligation to deceased and living clients); United States v. Baker, 256 F.3d 855, 860 (9th Cir. 2001) (the defense attorney was under investigation for cooperating with the prosecution); State v. Regan, 143 Wn. App. 419, 426-27, 177 P.3d 783, rev. denied, 165 Wn.2d 1012, 198 P.3d 512 (2008) (attorney was a potential witness in the client's case).

Irreconcilable Conflict

In the alternative, Schoolcraft asserts that because the record demonstrates an irreconcilable conflict, the trial court erred by failing to appoint substitute counsel. Schoolcraft contends that the trial court also improperly failed to inquire into the nature of the conflict. Schoolcraft argues that when he asked the trial judge to reappoint his attorney he described an irreconcilable conflict. But despite noting previous differences, Schoolcraft unequivocally asked the trial judge to reappoint the attorney who had represented him. Schoolcraft also unequivocally expressed

confidence in his attorney: "I feel assured that my attorney is going to do the job the best of his ability." Moreover, Schoolcraft did not ask the court to appoint a different attorney.

Schoolcraft's reliance on United States v. Nguyen, 262 F.3d 998, 1003 (9th Cir. 2001), to argue that the trial court also erred by not privately questioning Schoolcraft or his attorney, is misplaced. Nguyen is distinguishable. In Nguyen, a non-English speaking defendant asked to substitute counsel because he had stopped communicating with the appointed attorney. The defendant also sought to present testimony from other witnesses about the breakdown in communication. On appeal, the Ninth Circuit held that the trial court abused its discretion in denying the motion for new counsel without the defendant present and in refusing to schedule a hearing. Nguyen, 262 F.3d at 1004.

Motion to Dismiss for Governmental Misconduct

Schoolcraft asserts that the court abused its discretion in denying his motion to dismiss for governmental misconduct. Schoolcraft alleged that Corrections Officer Nicholas impermissibly read his legal documents and conveyed that information to the prosecutors.

To warrant dismissal for government misconduct, the defendant must show actual rather than speculative prejudice affected his right to a fair trial. State v. Rohrich, 149 Wn.2d 647, 657, 71 P.3d 638 (2003). Dismissal is not justified when suppression of evidence will eliminate whatever prejudice is caused by the

misconduct. City of Seattle v. Orwick, 113 Wn.2d 823, 831, 784 P.2d 161 (1989). We review the trial court's decision to deny a motion to dismiss for governmental misconduct for an abuse of discretion. State v. Michielli, 132 Wn.2d 229, 240, 937 P.2d 587 (1997).

Schoolcraft relies on State v. Cory, 62 Wn.2d 371, 374, 382 P.2d 1019 (1963), to argue that the governmental misconduct warranted dismissal. In Cory, the defendant's private conversations with his attorney in jail were taped, and the taped conversations were made available to the prosecutors in the case. Cory, 62 Wn.2d at 372. The court concluded that the "shocking and unpardonable" intrusion into privileged communications required dismissal of the charges. Cory, 62 Wn.2d at 378.

Here, unlike in Cory, there is no evidence that even if Officer Nicholas impermissibly read Schoolcraft's legal materials, he provided the prosecutors with that information. The State presented testimony showing that no information from any corrections officer was conveyed to any of the prosecutors in the case. Nonetheless, the court issued an order prohibiting Officer Nicholas from testifying at trial and from relaying any information to the prosecutors. We conclude the trial court appropriately addressed Schoolcraft's allegation of governmental misconduct and did not abuse its discretion in denying his motion to dismiss.

Statement of Additional Grounds for Review

Schoolcraft contends there was insufficient evidence that Officer Meade was wearing a police uniform. Viewing this evidence in the light most favorable to the

State, a rational trier of fact could have found beyond a reasonable doubt that Officer Meade was in uniform. State v. Luther, 157 Wn.2d 63, 77, 134 P.3d 205 (2006). Officer Meade and Taylor testified that Officer Meade was in uniform.

Schoolcraft argues that his attorney provided ineffective assistance of counsel by failing to address the alleged irreconcilable conflict, failing to present the two motions to dismiss, and failing to request an instruction to rebut the reckless driving element. To prevail on a claim of ineffective assistance of counsel, a defendant must show both deficient performance and resulting prejudice. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If the defendant fails to satisfy either part of the test, the court need not inquire further. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). The defendant is prejudiced if it is reasonably probable that, if not for counsel's deficient performance, the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). A claim for ineffective assistance of counsel cannot be based on conduct that can be fairly characterized as legitimate trial strategy or tactics. McFarland, 127 Wn.2d at 334-35. The record does not support Schoolcraft's argument that there was an irreconcilable conflict, that his attorney improperly refused to file the motions to dismiss or did not request appropriate jury instructions.

Schoolcraft argues that the court erred in granting his motion to proceed pro se because he did not knowingly and intelligently waive his right to counsel. But the trial court's lengthy colloquy with Schoolcraft demonstrates that he was clearly advised of

the seriousness of the charge and the difficulties of proceeding pro se. The record shows that Schoolcraft knowingly and intelligently waived his right to counsel. State v. Modica, 136 Wn. App. 434, 441, 149 P.3d 446 (2006), aff'd, 164 Wn.2d 83, 186 P.3d 1062 (2008).

Schoolcraft asserts that his due process rights were violated when he was denied access to his attorney's files after the court granted his motion to proceed pro se. A defendant has a right to prepare a meaningful pro se defense. State v. Silva, 107 Wn. App. 605, 622, 27 P.3d 663 (2001). The measures necessary to enable the defendant to prepare a meaningful defense are left to the sound discretion of the trial

court. Silva, 107 Wn. App. at 622-23. Here, the record shows that the court sought to ensure that Schoolcraft had access to his attorney's files.

Schoolcraft contends that the trial court erred by not granting his request for a continuance after granting his motion to represent himself pro se on the first day of trial. We will not disturb a trial court's denial of a motion for a continuance absent a manifest abuse of discretion. State v. Cannon, 130 Wn.2d 313, 326, 922 P.2d 1293 (1996). Because Schoolcraft did not have a right to a continuance to accommodate his motion to proceed pro se, the court did not abuse its discretion in denying his motion to continue the trial. State v. Honton, 85 Wn. App. 415, 423-24, 932 P.2d 1276 (1997).

Last, Schoolcraft also contends the jury instructions did not allow him to argue his theory of the case. Contrary to Schoolcraft's assertions, the jury instructions allowed the defense to argue that the State did not prove beyond a reasonable doubt the charge of attempting to elude a police officer.

We affirm.

Schindler, C.J.

WE CONCUR:

Appelwick, J.

Becker, J.